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Interpretive Problems of Ohio's Long-Arm Statute

Gerald H. Rubin

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THE RECENT TREND of many jurisdictions to enact long-arm statutes reflects the concern of these States to afford redress for damage to local interests by nonresidents who heretofore have been immune to in personam jurisdiction unless certain restrictive tests were satisfied. Prior to passage of long-arm statutes, unless a plaintiff showed that a nonresident actually[1] or impliedly[2] consented to personal jurisdiction, or was present in the State,[3] the nonresident escaped the State power to enforce a judgment against him. The common law basis for acquiring jurisdiction over a foreign corporation was often limited to those instances in which the corporation was doing business in the State.

The impetus for the creation of the long-arm statutes was provided by the United States Supreme Court's decision in *International Shoe Co. v. Washington*,[4] wherein the Court formulated the principle that a State should be able to exercise jurisdiction by substituted or constructive service over a nonresident who maintained minimal contacts with the forum State as long as the requirements of fair play and substantial justice were met.[5]

The term long-arm statute is utilized to describe the recent State legislation because constructive service can be made on the secretary of state to "pull" the defendant back into the territorial limits of the forum's jurisdiction if the conduct of the defendant met certain statutory prescriptions. On September 28, 1965, the Ohio

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[1] *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

[2] *See* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1856).

[3] *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

[4] 326 U.S. 310 (1945).

[5] In Hanson v. Denckla, 357 U.S. 235 (1958), the Court implied that there still remain barriers to unilateral power over nonresidents by demanding that the party asserting jurisdiction must show that the defendant directly and voluntarily utilized the State in order to conduct his activities. *Id.* at 250-54. In light of a more recent and cogent pronouncement by the High Court, the constitutional validity of long-arm statutes can no longer seriously be questioned. In Rosenblatt v. American Cyanamid Co., 382 U.S. 110 (1965) (per curiam) the defendant was served in Italy under New York's long-arm statute for an intentional tort committed in New York. He appealed to the Supreme Court alleging that the New York court had failed to obtain personal jurisdiction because the statute failed to meet the 14th amendment's due process requirement. The Court, in a 2-line opinion, dismissed for want of a substantial federal question thereby rejecting the defendant's argument. In light of the fact that the Court has upheld the validity of a nonresident motor vehicle act permitting analogous "reach" in the case of mere negligence, it seems unlikely that the due process validity of long-arm statutes is limited to cases involving intentional torts. *See* Hess v. Pawlowski, 274 U.S. 352 (1927). The facts of the *Rosenblatt* case can be found in Mr. Justice Goldberg's chamber opinion denying defendant's motion to stay the New York action, 86 S. Ct. 1 (1965).

long-arm statute became effective.[6] Its provisions are somewhat similar to forerunning statutes of various jurisdictions.[7] It is the purpose of this Note to point out some of the problems engendered by the enactment of the long-arm statute and attempt their solution by analyzing recent decisions of both Ohio and other jurisdictions which have similar statutes.[8]

I. INTERPRETIVE PROBLEMS

A. Can Residents Who Commit Tortious Acts and Subsequently Become Nonresidents Be Reached?

Suppose on January 2, 1966, Dr. Smith commits malpractice and his patient becomes aware of the injury on that date. Shortly thereafter, Dr. Smith moves to California. Can jurisdiction be acquired over Dr. Smith, who is now a nonresident?

(1) In Pari Materia. —Although the Ohio statute defines those persons amenable to process as including, besides individuals, legal and commercial entities who are nonresidents of the State, no distinction is expressly made as to those entities who were nonresi-

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[6] 131 Ohio Laws 646 (1965), as codified in OHIO REV. CODE ANN. §§ 2307.381-.385 (Page Supp. 1966) [hereinafter cited as CODE].

[7] Ohio's long-arm statute is based, with modification, upon the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03 (1963). The defendant is subject to Ohio jurisdictional power if his conduct meets the following substantive tests:

(a) A Court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
  (1) Transacting any business in this state;
  (2) Contracting to supply services or goods in this state;
  (3) Causing tortious injury by an act or commission in this state;
  (4) Causing tortious injury in this state by an act or commission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
  (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
  (6) Having an interest in, using, or possessing real property in this state;
  (7) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(b) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him. CODE § 2307.382 (Supp. 1966).

Id. § 2307.383 authorizes personal service in any county in the State, or where the defendant may be found, or substituted service on the secretary of state.

[8] For treatment of the actual reach of the long-arm, see Note, *Ohio's Long Arm Statute*, 15 CLEVE.-MAR. L. REV. 363 (1966); 35 U. CIN. L. REV. 157 (1966).

dents at the time of the accrual of the cause of action or those whose residence was other than Ohio at the time suit was filed.[9] Thus, the defendant may assert that, if the definition of person in section 2307.381 of the long-arm statute is construed in pari materia with jurisdictional section 2307.382, it would appear that a former resident who committed one of the jurisdictional acts while a resident, but who had become a nonresident by the time of service, could escape service of process. This becomes clear when one substitutes the definition of person given in section 2307.381 into section 2307.382. It would read: "A court may exercise personal jurisdiction over . . . [an] entity . . . who *is* a nonresident of this state who *acts* directly . . . as to a cause of action arising from the entity . . . who *is* a nonresident of this state . . . *causing* tortious injury . . . ."[10] Hence, the tortious injury must be caused by the one who is presently a nonresident, because the present tense is used to define both nonresident persons and the defendant who causes the injury.

(2) New York Precedent. —In rebutting the above construction, a plaintiff may well rely on prior decisional law. In *O'Connor v. Wells*[11] a New York court interpreted that State's long-arm statute[12] as precluding such a result because the word "any" modified "nondomiciliary" and thus referred to "all" or "every" nondomiciliary, even though such a party was a domiciliary at the inception of the cause of action.[13] It could thus be asserted that the Ohio provision[14] should likewise be construed so as to avoid a gap not intended by the legislature.

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[9] CODE § 2307.381 (Supp. 1966). *See also* LA. REV. STAT. § 13:3206 (Supp. 1966), wherein there is express provision for service upon nondomiciliaries as of the time suit is filed.

[10] CODE §§ 2307.381-.382 (Supp. 1966) (emphasis added).

[11] 43 Misc. 2d 1075, 252 N.Y.S.2d 861 (Sup. Ct. 1964); *see* Levin v. Ruby Trading Corp., 248 F. Supp. 537 (S.D.N.Y. 1965).

[12] N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1963) provides in part: "A court may exercise personal jurisdiction over *any non-domiciliary*, or his executor or administrator as to a cause of action . . . ."(emphasis added).

[13] In interpreting this as applicable to a former domiciliary, the New York court stated:

> Any other construction would defeat the purpose of the statute by permitting a domiciliary to commit a tort here, remove himself beyond the boundaries of New York claiming a change of domicile and thus avoid the jurisdiction of our state. The Legislature did not intend to so restrict the jurisdiction of our courts . . . . 43 Misc. 2d at 1076, 252 N.Y.S.2d at 863.

[14] CODE § 2307.381 (Supp. 1966), provides in part: " 'person' includes an individual . . . or *any* other legal or commercial entity . . . ." (emphasis added). This construction may well meet the objection that "any" in the Ohio provision refers to entity rather than nonresident. Also, "resident" is used in lieu of "domiciliary" as utilized by the New York provision.

(3) Nonresident Motor Vehicle Act. —On the other hand, the former resident could assert his immunity by pointing out that the Nonresident Motor Vehicle Act[15] specifically provided for service over former residents who became nonresidents after the cause of action accrued. It may therefore be argued that had the legislature intended the same effect for the long-arm statute, an explicit provision would have been made.

(4) Opinion. —It appears that the Ohio courts should construe the new statute as enabling the injured party to gain jurisdiction over the nonresident who was a resident at the time of the injury-producing act. First, it should be noted that the long-arm statutes generally were "designed to give jurisdiction to local courts in most types of local causes of action even though the defendant may for some reason not be subject to personal service locally . . . ."[16] It would not necessarily be possible to gain in personam jurisdiction over a former resident through service by publication under section 2703.14(L)[17] because only in rem jurisdiction is authorized. Under this section the plaintiff must affirmatively show that the defendant left with *intent* to escape jurisdiction. Furthermore, the plaintiff may be barred because the defendant is no longer a "resident" of Ohio and thus may escape the ambiguous statutory terms. Second, it would seem that, if jurisdiction is obtainable under the long-arm statute to protect State interests over those defendants who were *never* residents, a fortiori, jurisdiction should be permitted to reach former residents because State interest here would seem to be even stronger.[18]

B. *Can the Long-Arm Statute Be Utilized in a Nonresident Motorist Case?*

It has been contended that the long-arm statute creates a basis for jurisdiction in some situations where prior statutes are still in effect.[19] If conflict results, the question thus arises whether Ohio's long-arm provision displaces these prior statutes, whether the prior enactment is dominant, or whether the plaintiff possesses the option to employ either jurisdictional statute. For example, suppose a

[15] CODE § 2703.20 (1953).

[16] Leflar, *Act 101 — Uniform Interstate and International Procedure Act*, 17 ARK. L. REV. 118 (1963).

[17] CODE § 2703.14(L) (1953).

[18] The principle of the "enduring relationship" between person and State is set forth in Millikin v. Meyer, 311 U.S. 457 (1940).

[19] Markus, *The Longer Arm of the Law*, 37 J. CLEVE. B. ASS'N 121 (1966).

plaintiff is injured in Ohio by a nonresident in an automobile accident. Under the Nonresident Motor Vehicle Act, jurisdiction is authorized but venue is limited for the plaintiff to the county where the accident occurred.[20] On the other hand, if jurisdiction were obtained over the nonresident through the long-arm provision[21] he could bring the action in the county of his residence *or* in the county where the cause of action originated.[22]

(1) Plaintiff's Position. —One writer has suggested that the plaintiff can rightfully choose either venue.[23] Under this view, a literal reading of the long-arm statute would be advanced. Since negligent conduct by a nonresident motorist would clearly consist of tortious conduct within the statutory definition, jurisdiction under the long-arm statute could be chosen and the plaintiff would have the option of filing suit in the county of his residence.

(2) Hayslip v. Conrad Products, Inc.[24] —A contrary position has recently been taken by the Scioto County Court of Common Pleas. The court viewed the venue provisions of the long-arm statute as being in the general venue section of the *Code.* Hence, it reasoned that the legislature intended that in nonresident motorist cases, the venue provision for the Nonresident Motor Vehicle Act would control because of its specificity. The court bolstered its position by pointing out the injustice of allowing a plaintiff to choose a forum located where the defendant had never been. The convenience of obtaining witnesses and evidence in the county where the injury occurred should necessitate trial at that location. In addition, the court noted that one of the main reasons for the adoption of the long-arm statute was to cover product liability cases,[25] whereas adequate remedies for motor vehicle cases had been previously provided by the Nonresident Motor Vehicle Act.

(3) Opinion. —While considering these two divergent views, one should reconsider the purpose for the enactment of the long-arm statute. As stated previously, the statutes were enacted to provide jurisdiction to those resident plaintiffs which, for various rea-

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20 CODE § 4515.01 (1964) (venue provision for all motor vehicle cases).

21 Jurisdiction under the long-arm statute would appear to stem from the fact that the defendant had committed a tortious act in Ohio. *Id.* § 2307.382(A)(3) (Supp. 1966).

22 *See id.* § 2307.384 (emphasis added).

23 Markus, *supra* note 19, at 141.

24 10 Ohio Misc. 155, 161, 226 N.E.2d 839, 844 (C.P. 1967).

25 *Id.* at 159-62, 226 N.E.2d at 843-44.

sons, could not obtain jurisdiction over nonresident defendants.[26] Further, it was the policy of the act to allow actions where evidence and witnesses could be effectively presented. Upon this basis, the decision of the *Hayslip* court could be supported.[27] A defendant might state that if convenience is deemed of great import, it could be considered as *contrary* to the legislative intent to enable the plaintiff to shift the suit to the county of his residence. Further, if a prior statutory means existed by which jurisdiction could be obtained, what purpose would be served by creating another scheme? Also, even if the long-arm statute were created so that "local" law would apply, no harm would be done by limiting the venue of an auto collision case to the county of the accident because the same *State law* would apply. On the other hand, the plaintiff may contend that because the long-arm statute specifically states that prior jurisdictional statutes are not repealed, it would appear that either the long-arm statute venue provision or a prior venue provision could be selected. This position is at best tenuous because it was never the legislative intent to replace the specific venue provisions of the Nonresident Motor Vehicle Act with the general long-arm statute venue provision.[28]

C. *Does the Long-Arm Statute Toll the Statute of Limitations?*

The present Ohio saving statute provides that when a cause of action accrues against a person, "if he is out of the state, or has absconded, or conceals himself," the statute of limitations does not run "until he comes into the state or while he is absconded or concealed."[29] Also, if the statute of limitations has begun to run, and the defendant thereafter absconds, conceals himself, or departs from the State, the period of absence is not counted in the time within which the action must be brought. The enactment of the long-arm statute raises the possibility that the defendant is out of the State yet the *power* of the plaintiff to bring suit is available. Must he do so within the statutory period or does he still obtain the benefits of the saving statute?

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[26] Text accompanying note 16 *supra.*

[27] However, a plaintiff could show that the "convenience of the parties" factor should benefit him since the long-arm statute was created as further remedial protection for the injured party. *See* Leflar, *supra* note 16.

[28] *See* 50 OHIO JUR. 2D *Statutes* § 104, at 83-87, § 348, at 325 n.20 (1961). *But see id.* § 103, at 83, § 348, at 325 n.18.

[29] CODE § 2305.15 (1953).

(1) Tolling of Actions Against Real Persons. —The Ohio Supreme Court, in *Couts v. Rose*,[30] held that the plaintiff injured in an automobile accident need not institute her suit within the 2-year statute of limitations, although she had the power to institute suit against the defendant nonresident motorist who had left the State. The court reasoned that the Nonresident Motor Vehicle Act did not impliedly repeal the saving statute; and, although it was the purpose of the statute of limitations to encourage or require prompt adjudication of legal grievances, the saving statute unambiguously expressed the legislative intent. It was clear that the court saw the ramifications of its decision, but feared imposing judicial legislation.[31]

(2) Tolling of Actions Against Corporations. —In the recent decision of *Thompson v. Horvath*,[32] the Ohio Supreme Court retreated somewhat from its position in *Couts* by holding that a domestic corporation which subjected itself to substituted service[33] was really present within the meaning of the saving statute because it was amenable to process, although it was out of the State physically. The court noted that in *Title Guaranty & Surety Co. v. McAllister*,[34] it had reached a similar result as regards a foreign corporation "doing business" in the State,[35] and could find no meaningful basis for distinction between a domestic and a foreign corporation. The court reasoned that because a corporation is a legal creature, presence is determined by the *power* of the State courts to assert jurisdiction over it. *Couts* was distinguished on the basis that it involved *real* persons, and the language of the saving statute could not embrace corporations as persons.[36]

It is submitted that *Horvath* created a legal fiction to avoid overruling *Couts* directly. It is quite questionable that corporations are not persons within the terms of the saving statute. In *Moss v.*

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30 152 Ohio St. 458, 90 N.E.2d 139 (1950).

31 *Id.* at 462-63, 90 N.E.2d at 141.

32 10 Ohio St. 2d 247, 227 N.E.2d 225 (1967).

33 An Ohio statute provides that when a statutory agent of the domestic corporation can not be found, or the agent no longer has his original statutory address, or the corporation fails to maintain the required statutory agent, the aggrieved party, after a diligent search, may allege one of the above three grounds, and the secretary of state becomes agent of the corporation. CODE § 1701.07(h) (1963).

34 130 Ohio St. 537, 546, 200 N.E.2d 831, 835 (1936).

35 CODE § 3927.03 (1953) provides for substituted service by the superintendant of insurance when the surety and guarantee corporation ceases to do business or no statutory agent can be found.

36 10 Ohio St. 2d at 251, 227 N.E.2d at 228.

Standard Drug Co.[37] the Ohio Supreme Court had not found any legislative intent to exclude corporations from persons in the saving statute. However, had the *Horvath* court overruled *Couts* pro tanto, the plaintiff could have argued that the court was engaging in judicial legislation. Because *Couts* had decided that the legislative grant of substituted service in cases arising under the Nonresident Motor Vehicle Act did not impliedly repeal the saving statute as to such actions, and the legislature did not, subsequent to *Couts*, modify the statute, it would appear that the court could not have justified a direct overruling on stare decisis principles. However, the distinction between a corporation and a real person made by the *Horvath* court at least mitigates against the prejudice to defendants[38] produced by *Couts*. As far as corporations are concerned, Ohio is now joining the majority jurisdictions which recognize that, when a plaintiff is given the *power* to reach out-of-State defendants, the reason for the rule of tolling, nonamenability to service of process, is lacking.[39]

(3) New Legislation Needed. —It has recently been held by several New York courts[40] that New York's saving statute,[41] which provides that the statute of limitations does not toll where substituted service is available, indicates clearly the legislative intent to let the statute of limitations run where service is available by a long-arm

[37] 159 Ohio St. 464, 112 N.E.2d 542 (1953).

[38] *See* 19 U. CIN. L. REV. 397 (1950), wherein the author cites *Couts* as a minority rule and is critical of its holding.

[39] *See* Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711 (1952), wherein the State supreme court interpreted a similar saving statute, IOWA CODE ANN. § 614.1 (1950), as inapplicable in a nonresident auto case because the power of service was available to the plaintiff. Here the court reasoned that although the legislature had not amended its saving statute when the nonresident statute took effect, prior decisional law had interpreted the statute as inapplicable when service was not escapable. Similarly in Bergman v. Turpin, 206 Va. 539, 145 S.E.2d 139 (1965), the court held that Virginia's saving statute, VA. CODE ANN. § 8-33 (1950), providing for tolling where the defendant departs from the State or where he obstructs the prosecution of the claim, was inapplicable where substituted service was available. *See* Scorza v. Deatherage, 110 F. Supp. 251 (S.D. Mo.), *aff'd*, 208 F.2d 660 (8th Cir. 1953); Peters v. Tuell Dairy Co., 250 Ala. 600, 35 So. 2d 344 (1948); Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966); Coombs v. Darling, 116 Conn. 643, 166 A. 70 (1933); Nelson v. Richardson, 205 Ill. App. 504, 15 N.E.2d 17 (1938); Haver v. Bassett, 287 S.W.2d 342 (Mo. Ct. App. 1956); Whittington v. Davis, 221 Ore. 209, 350 P.2d 913 (1960); Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910 (1954); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189 (1947); Smith v. Forty Million, Inc., 64 Wash. 2d 912, 395 P.2d 201 (1964). *But see* Macri v. Flaherty, 115 F. Supp. 739 (E.D.S.C. 1953); Gotheimer v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430 (Sup. Ct. 1942); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

[40] Lander v. Gillman, 53 Misc. 2d 65, 278 N.Y.S.2d 149 (Sup. Ct. 1967); Burris v. Alexander Mfg. Co., 51 Misc. 2d 543, 273 N.Y.S.2d 542 (Sup. Ct. 1966).

[41] N.Y. CIV. PRAC. LAW § 207 (McKinney 1963).

statute. The Ohio legislature should consider a similar provision for various reasons. First, it would be most unjust to subject defendants who act in good faith to stale claims, especially since jurisdiction could have been promptly acquired under the long-arm statute. Second, one of the purposes of the long-arm statutes is to foster speedy trials, not to clog the docket with stale claims.[42]

(4) Ramifications of the Ohio Rule — A Proposed Solution. —It should be emphasized that the present saving statute employs the three possibilities for tolling — out-of-State, absconded, or concealed — with no reference to the bona fides of the act. Hence, if the hypothetical Dr. Smith, after having committed malpractice, left Ohio without intent to escape jurisdiction, he could be subject to suit many years later.

The contentions advanced on behalf of corporations to justify nontolling would seem even more applicable to real defendants such as Dr. Smith. Both are subject to service under Ohio's long-arm statute;[43] yet, under *Horvath*, the bad faith corporate defendant, whose officers have become aware of corporate liability and deliberately removed the corporate entity from Ohio in order to avoid process, would gain the benefits of nontolling. The court in *Couts* referred to the inequity of an absconding party receiving nontolling privileges;[44] and it would seem reasonable that, as to this type of defendant, the statute of limitations should not begin to run, even though service of process could have been obtained. Under the present rule, however, the individual good faith nonresident defendant, who, unlike the corporate defendant, possesses no resources to locate witnesses and collect stale facts is put in a worse position than the bad faith corporate defendant. It has been suggested by some writers that even a bad faith corporate defendant should not be subject to stale claims,[45] and, on equitable considerations, it would certainly seem reasonable to offer even more protection to real, good faith defendants. Some consideration should therefore be given to modifying the present saving statute to bar tolling against both corporations and individuals who, in good faith, leave the State after a tort has been committed. Because they are subject to long-arm jurisdiction, the statute of limitations should not toll. On the

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[42] *See* Markus, *supra* note 19, at 143; Note, *Limitations of Actions: Nontolling Effect of "Long Arm" Statutes*, 20 OKLA. L. REV. 211, 213-14 (1967) (equal protection argument).

[43] CODE § 2307.381 (Supp. 1966). This section is set forth in note 14 *supra.*

[44] 10 Ohio St. 2d at 251, 227 N.E.2d at 228.

[45] *See* Note, *supra* note 42.

other hand, those defendants, both corporate and real, who leave in bad faith may well be in no position to object to nontolling, as suggested by *Couts*.[46] Thus, perhaps it would be more meaningful to redraft the saving statue to operate in terms of the bona fides with which the defendant leaves the jurisdiction.

II. RETROACTIVITY

One of the first issues raised in a case arising under the long-arm statute is whether the statute can be applied retroactively. Suppose, for example, that X Co., a New York corporation which meets the necessary contacts provisions of Ohio's long-arm statute, manufactures a product in 1964, intended for use in Ohio. The product is defective and causes personal injury to the plaintiff in 1964. The plaintiff was unable to assert jurisdiction over the defendant until 1965 when Ohio passed its long-arm statute. Can the plaintiff bring his cause of action in 1967, although the defendant's conduct which gave rise to the cause of action occurred *prior* to the enactment of the long-arm statute?

A. Nature and Scope of Problem

It has been suggested that a statute is retroactive if it determines "the legal significance of acts or events that have occurred prior to the date of its enactment."[47] The traditional view taken by many courts, including those in Ohio, would hold that a new statute could be applied to events prior to the passage of the statute, as long as its *effect* does not destroy valuable property rights, liberties, or rights of action. If conduct giving rise to liability or liberty is considered by a court as worthy of protection against a retroactive application, the court will apply the "vested right" theory and deem the new statute as substantive in nature, and prior conduct as vested.[48] However, if prior acts are subservient to the benefits accrued by a retroactive application, the statue will be interpreted as merely affecting procedure.

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[46] It must be assumed, of course, that the plaintiff could obtain jurisdiction over good faith defendants who were residents of Ohio at the time of accural of the cause of action and later became nonresidents. If the long-arm statute were construed contrarily, however, the saving statute should apply since the plaintiff could not obtain jurisdiction over the defendant. *See* text accompanying notes 9-18 *supra.*

[47] Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 544 (1956).

[48] *See* Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 218 (1960).

It will subsequently be shown that the substance-procedure dichotomy is a tenuous theory at best, and, as applied to the long-arm statute, a due process approach by the courts would more correctly identify the elements which do, or should, influence the decisions. Under the due process approach consideration would be given by the courts to whether nonamenability to suit is a valuable liberty or right, and even if it is, whether it may be removed, on equitable considerations, in order to provide the injured plaintiff with a new source of jurisdiction, although the plaintiff's injury occurred *prior* to passage of the new statute.

B. *Does Ohio's Retroactivity Statute Apply to Entirely New, Nonamending Statutes?*

(1) The Statute. —Ohio Revised Code section 1.20, a retroactivity provision, provides:

> When a statute is repealed or amended, such repeal or amendment does not affect pending actions . . . . When the repeal or amendment relates to the remedy, it does not affect pending actions . . . unless so expressed, nor does [it] affect causes of . . . action . . . existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.[49]

(2) Split Decisions: Opinion. — The first inquiry should be whether the long-arm statute is an amendment or repeal provision and, if neither, whether its application to preexisting facts is of such a nature to call the retroactivity section into play. Ohio's long-arm statute may be thought of as entirely new legislation which neither repeals nor amends expressly, but is an *addition* to the general venue statute.[50] It does not appear that the long-arm statute is an express amendment of the general venue statute since it does not state that the new sections supersede the general venue statute as required by the Ohio constitution.[51] Should section 1.20 still apply? In *Wheeling & Lake Erie Railroad v. Toledo Railway Terminal Co.*[52] the State supreme court held[53] that new legislation is outside the ambit of the retroactivity section so that *pending* actions could be affected. However, in *Cincinnati, Hamilton & Dayton Railroad v. Hedges,*[54] the court interpreted section 1.20 to encompass *even new*

[49] CODE § 1.20 (1953).
[50] *Id.* § 2307.38.
[51] OHIO CONST. art. II, § 16.
[52] 72 Ohio St. 368, 74 N.E. 209 (1905).
[53] *Id.* at 386-87, 74 N.E. at 214.
[54] 63 Ohio St. 339, 58 N.E. 804 (1900).

legislation, because it was the policy of that section to prohibit retroactive application of a remedial statute in the absence of specific statutory language to the contrary.[55] Other cases have reached a similar result.[56] If the decisions contrary to *Wheeling* stand for the proposition that new legislation can have as drastic effect on the legal incidents attached to conduct which preceded the new enactment as do formal amending or repealing matter, it is quite reasonable that the purpose of section 1.20 to prohibit retroactive laws should, of necessity, be considered in the long-arm situation. For example, a defendant may pursue commercial activity, well realizing that in personam jurisdiction may not be acquired over him by existing statutory and common law methods. Suppose a new statute is passed granting the plaintiff the power to effect in personam jurisdiction over the defendant and in effect amends the prior absence of that power. Reliance should be, and often is, one of the major considerations in determining whether a new statute will be retroactively applied.[57] It seems clear that the absence of a specific jurisdictional statute may well be ground for as much reliance by a defendant as an existing statute which specifically denies jurisdiction. Thus the reasons for applying section 1.20 pertain in both situations.

C. *The Statutory Prohibition and Its Exceptions*

Before a plaintiff attempts to assert that the long-arm statute is only a procedural statute, and that therefore the defendant's prior nonamenability to service of process was never a vested right, he may well find the defendant asserting that the retroactivity section prohibits new, amending, or repealing legislation *even if* the long-arm is merely procedural.

(1) Ohio Case Law Denying Procedural Exceptions. —In *Cincinnati, Hamilton & Dayton Railroad v. Hedges*,[58] the Ohio Supreme Court stated that even though a statute is remedial in character, section 1.20 would prohibit a retroactive application.[59] Also,

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[55] *Id.* at 341, 58 N.E. at 804.

[56] *See* State *ex rel.* Board of Educ. v. Arch, 113 Ohio St. 482, 149 N.E. 405 (1925); Young v. Shallenberger, 53 Ohio St. 291, 41 N.E. 518 (1895); *cf.* State v. Whitmore, 126 Ohio St. 381, 185 N.E. 547 (1933). *But see* Schlagheck v. Winterfield, 108 Ohio App. 299, 161 N.E.2d 498 (1958); Bruney v. Little, 8 Ohio Misc. 393, 222 N.E.2d 446 (C.P. 1966).

[57] *See* notes 81-88 *infra* & accompanying text.

[58] 63 Ohio St. 339, 58 N.E. 804 (1905).

[59] *Id.* at 341, 58 N.E. at 805.

in *Bruney v. Little*,[60] a common pleas court reasoned that if a new statute greatly affected the interest of the defendant, it should not be retroactively applied, even if it were partly procedural and partly substantive.[61]

(2) Ohio Case Law Permitting Procedural Exceptions. —On the other hand, in *Smith v. New York Central Railroad*[62] the supreme court held that a statute which reduced the period within which a party must bring a personal injury action was remedial in character and applied to existing latent causes of action. Also, in *O'Mara v. Alberto-Culver Co.*,[63] the Hamilton County Court of Common Pleas reasoned that the term remedial as used by the *Hedges* court could not mean procedural because it would be in direct conflict with *Smith*. The court felt that remedial meant anything which remedies wrongs or abuses and that the statement in *Hedges* was mere dictum because the change in the law there under consideration was substantive (quantum of proof), rather than procedural.[64] In *Busch v. Service Plastics Inc.*[65] a federal district court recognized as the Ohio rule that a procedural statute is an exception to the retroactivity statute. In other Ohio cases which ultimately declared a statute to be substantive in nature, the courts nevertheless recognized that a procedural statute is an exception to section 1.20.[66] It would therefore seem clear that the weight of Ohio authority recognizes procedural statutes as capable of retroactive application, notwithstanding section 1.20.

D. Decisions in Ohio and Other Jurisdictions Relating to Retroactive Application of Long-Arm Statutes

(1) Ohio Law. —Those Ohio courts which have held that the long-arm statute is merely a procedural statute include a common pleas court[67] and a federal district court.[68] Contrarily, a common pleas court has held that the long-arm statute should not be retro-

[60] 8 Ohio Misc. 393, 222 N.E.2d 446 (C.P. 1966).

[61] *Id.* at 403, 222 N.E.2d at 454.

[62] 122 Ohio St. 45, 170 N.E. 637 (1930); *cf.* Beckman v. State, 122 Ohio St. 443, 5 N.E.2d 482 (1930).

[63] 6 Ohio Misc. 132, 215 N.E.2d 735 (C.P. 1966).

[64] *Id.* at 134, 215 N.E.2d at 737.

[65] 261 F. Supp. 136 (N.D. Ohio 1966).

[66] *See, e.g.*, Schaeffer v. Alva West & Co., 53 Ohio App. 270, 4 N.E.2d 720 (1936).

[67] O'Mara v. Alberto-Culver Co., 6 Ohio Misc. 132, 215 N.E.2d 735 (C.P. 1966).

[68] Busch v. Service Plastics, Inc., 261 F. Supp. 136 (N.D. Ohio 1966) (cause of action existing but filed after enactment of long-arm statute).

actively applied on the ground that the defendant's prior immunity from suit was a vested right that could not be abrogated by statute.[69] Similarly the Cuyahoga County Court of Appeals has recently denied retroactive effect to the long-arm statute, where a cause of action was filed and pending before the effective date of the statute.[70] Apparently this court considered the long-arm statute to be substantive in nature, because the holding was based upon *Schaeffer v. Alva West & Co.*[71] In *Schaeffer*, the Mahoning County Court of Appeals denied retroactive effect to a cause of action existing before the effective date of the Nonresident Motor Vehicle Act, but filed after the effective date of the statute. The court reasoned that (1) it was against the policy of Ohio to construe statutes retroactively, and (2) since the statute designated the secretary of state as agent for the defendant if the defendant chose to act by operating his automobile in Ohio, the delegation of agency would be inapplicable where the act occurred prior to the statute's effective date.[72]

(2) Other Decisional Law. —It appears that the majority of jurisdictions have also considered procedural statutes as a general exception to the retroactivity rule, and have held their long-arm statutes retroactive as procedural statutes.[73] In *Nelson v. Miller*,[74]

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[69] Bruney v. Little, 8 Ohio Misc. 393, 222 N.E.2d 446 (C.P. 1966).

[70] Lantsberry v. Tilley Lamp Co., Civil No. 28,085 (Cuyahoga Co. Ct. App., Apr. 20, 1967); Wise v. Tilley Lamp Co., Civil No. 28,086 (Cuyahoga Co. Ct. App., Apr. 20, 1967).

[71] 53 Ohio App. 270, 4 N.E.2d 720 (1936).

[72] "[The Nonresident Motor Vehicle Act] could not be retroactive in effect because the non-resident would not be amenable to its jurisdictional provision until after he constituted the Secretary of State his agent to accept service of process." *Id.* at 276, 4 N.E.2d at 722-23.

[73] For retroactive holdings see McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Clews v. Stiles, 303 F.2d 290 (10th Cir. 1960); Bluff Creek Oil Co. v. Green, 257 F.2d 83 (5th Cir. 1958); Smith v. Putnam, 250 F .Supp. 1017 (D. Colo. 1965); Coreil v. Pearson, 242 F. Supp. 802 (W.D. La. 1965); Dantoja v. Pioneers Marine Carriers Corp., 235 F. Supp. 724 (D.P.R. 1964); Weber v. Hydroponics, Inc., 226 F. Supp. 117 (D. Mont. 1962); Hiersche v. Seamless Rubber Co., 225 F. Supp. 682 (D. Ore. 1963); Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962); Teague v. Damascus, 183 F. Supp. 446 (E.D. Wash. 1960); Safeway Stores, Inc. v. Shwayder Bros., 238 Ark. 768, 384 S.W.2d 473 (1964); Gray v. Armijo, 70 N.M. 245, 372 P.2d 820 (1962); Simonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964); Muraco v. Ferentino, 42 Misc. 2d 104, 247 N.Y.S.2d (Sup. Ct. 1964). *But see* Corn v. Shelton Equip. & Mach. Co., 259 F. Supp. 955 (W.D. Okla. 1966); Rozell v. Kaye, 201 F. Supp. 377 (S.D. Tex. 1962); Nevins v. Revlon, Inc., 23 Conn. Supp. 314, 182 A.2d 634 (1962); Hill v. Electronics Corp., 253 Iowa 581, 113 N.W.2d 313 (1962); Mladinich v. Kohn, 186 So. 2d 481 (Miss. Sup. Ct. 1966); *cf.* Jenkins v. Fawcett Publications, Inc., 204 F. Supp. 361 (N.D. Fla. 1962); Focht v. American Cas. Co., 103 Ga. App. 138, 118 S.E.2d 737 (1961); Chapman v. Davis, 233 Minn. 62, 45 N.W.2d 822 (1951); Zeig v. Zeig, 65 Nev. 464, 198 P.2d 724 (1948); Wein v. Crockett, 113 Utah 301, 195 P.2d 222 (1948).

[74] 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

the Illinois Supreme Court denied the defendant's contention that retroactive application of the Illinois long-arm statute would be unconstitutional both as to the Illinois constitution and the 14th amendment to the United States Constitution. The court reasoned that modern concepts of in personam jurisdiction have negated the consent theory of a bargain between the State and the nonresident. Today personal jurisdiction is based upon the exercise of the State's police power for the protection of its citizens against nonresidents. The court additionally pointed out that the statute involved merely established a new mode of procedure to secure existing rights.[75]

(3) Weight Given to Prior Nonresident Motor Vehicle Cases. —It should be noted that a defendant in Ohio could assert that the Illinois decision does not bear great weight because Illinois, unlike Ohio, had held its nonresident motorist statute to be retroactive.[76] However, the plaintiff would do well to show that some jurisdictions which have held their nonresident motor vehicle statutes to be prospective only, now hold their long-arm statutes to apply retroactively.[77]

E. Critique of the Substantive-Procedural Dichotomy and Proposed Solutions

(1) Incapability of Demarcation. —The labeling of a new statute as substantive or procedural to determine whether a prior right has vested has been criticized as producing inconsistent results.[78] An analysis of key Ohio cases would prove this theory cor-

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[75] *Id.* at 383-87, 153 N.E.2d at 676-78.

[76] Ogden v. Gianakos, 415 Ill. 591, 114 N.E.2d 686 (1953).

[77] New York has so modified its position. *Compare* Gruber v. Wilson, 276 N.Y. 135, 11 N.E.2d 568 (1937) *and* Kurland v. Chernobie, 260 N.Y. 254, 183 N.E. 380 (1932), *with* Simmonson v. International Bank, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964) (dictum) *and* Longines-Wittnauer Watch Co. v. Barnes & Reineche, Inc., 21 App. Div. 2d 470, 251 N.Y.S.2d 740 (1964), *aff'd*, 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68, *cert. denied*, 382 U.S. 905 (1965). *Compare* Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d 212 (1948) (nonretroactive application of a statute providing for substituted service upon a corporation acting ultra vires), *with* Safeway Stores, Inc. v. Shwayder Bros., 238 Ark. 768, 384 S.W.2d 473 (1964) (retroactive application of a long-arm statute).

Plaintiff might do well to consider the rationale of *Nelson.* He could show that the consent theory of *Schaeffer* was necessary in light of *Pennoyer v. Neff*, since in-State personal service was required. However, after *International Shoe*, the agency fiction could be disputed. Also, the Nonresident Motor Vehicle Act *makes* the secretary of state the nonresident's agent while the language in the long-arm statute *deems* the secretary of state agent for the nonresident. *Compare* CODE § 703.20 (1953), *with id.* § 2307.383 (Supp. 1966).

[78] *See* Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105, 1119 (1963).

rect. In *Smith v. New York Central Railroad*[79] the plaintiff filed her personal injury suit more than 2 years after her claim arose. The prior law had permitted a 4-year delay before filing. The new statute, which reduced the period to 2 years, was enacted after the plaintiff's claim arose, but before she filed suit. The court held that the claim was barred, because the limitation statute was procedural although it could probably be shown that the plaintiff relied on the prior law. In *Schaeffer & Co. v. Alva West & Co.*[80] the appellate court denied the plaintiff the benefit of the Nonresident Motor Vehicle Act service provision, on a finding that the statue was substantive, where the statute's effective date was subsequent to the facts giving rise to the cause of action. Although it could well be argued that the defendant's reliance would be frustrated if a contrary result occurred, it would seem that a new means of enforcing a cause of action would be procedural in nature. Thus, in *Smith* the plaintiff's reliance on past law was not given any weight while in *Schaeffer*, the defendant's reliance was supported by a holding of no retroactivity. Had the court expressed the underlying *reasons* for their ultimate holdings of procedure or substance, perhaps more predictability to the law would have arisen for future cases.

(2) Possible Contentions of the Plaintiff and the Defendant Based on Various Factors. —Various commentators have rejected the dichotomy in favor of weighing pertinent factors.[81] The most important of these parameters should be the justification of defendant's reliance on the prior lack of jurisdiction and the purpose of the new State enactments to provide more suitable methods for litigation of claims by its injured citizens. It has been suggested that *courts* adopt a due process approach to resolve the problem.[82] Under this view, one must ask whether it is reasonable or arbitrary to acquire personal jurisdiction over a defendant when his acts could at a former time have been immune from State court jurisdiction?

The defendant's reliance might be the basis for a bar to retroactive application. Although it has been stated that the defendant would not normally rely on a lack of jurisdiction over his person,[83]

[79] 122 Ohio St. 45, 170 N.E. 637 (1930).

[80] 53 Ohio App. 270, 4 N.E.2d 720 (1936).

[81] *See generally* Greenblatt, *supra* note 47; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960); Note, *supra* note 78.

[82] Note, *supra* note 78.

[83] Nelson v. Miller, 11 Ill. 2d 378, 383, 143 N.E.2d 673, 676; Greenblatt, *supra* note 47, at 567.

it is quite feasible that some defendants consider the possibility of suits in determining whether to market their goods in a certain jurisdiction.[84] Furthermore, it has been suggested, assuming such defendants do rely, that rights created by conduct involving expenditure of labor or capital are often afforded great protection.[85]

In relation to the reliance factor, the state of the law at the time of the events giving rise to the cause of action is an important factor; the more consistent the holdings denying retroactive effect to similar statutes, the less justification would later exist to apply long-arm statutes retroactively, and to frustrate a defendant's reasonable expectations.[86] As applied to Ohio's long-arm statute, it is quite conceivable that a defendant might have relied on *Schaeffer* in order to continue his commercial activity without fear of a retroactive application of a possible new substituted service statute. However, it has been shown that some jurisdictions have apparently not considered prior holdings on substituted service statutes as a bar to retroactive application of long-arm statutes.[87] Also, it is quite feasible that a defendant may have considered the state of the law of *other* jurisdictions because the forum State courts may look to other jurisdictional law to find a solution. Thus a plaintiff could assert that, although *Schaeffer* was applicable Ohio law and a defendant may have relied on it, other jurisdictions, including the Supreme Court of the United States,[88] have found nothing unconstitutional in retroactively applying a statute which authorized extraterritorial service of process. Hence, a plaintiff could argue that when the defendant acted, this law was on the books and that he should have been aware that in the future Ohio courts could justifiably rely on it.

It has also been suggested that the extent of abrogation of the asserted right[89] should be considered. If the prior right is now totally destroyed, the courts should be less apt to apply the new law retroactively. In considering this factor in the context of Ohio's long-arm statute retroactive application would completely abrogate the prior right to avoid service of process.

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[84] Note, *supra* note 78, at 1121.

[85] *See* Hochman, *supra* note 81, at 726; Slawson, *supra* note 81, at 226-51.

[86] *See* Greenblatt, *supra* note 47, at 567.

[87] *See* cases cited note 77 *supra* & accompanying text.

[88] *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957), wherein the forum jurisdiction, California, based its power on CAL. INS. CODE § 1610-20 (West 1955). The statute subjected foreign corporations to suit in California on insurance contracts with California residents even if service of process was made *outside* California.

[89] *See* Hochman, *supra* note 81, at 711.

Although a defendant might show actual reliance on Ohio law when he acted, severe loss of labor and capital, and a complete abridgement of his prior nonamenability to process, the plaintiff may attempt to show that this reliance was not justifiable. He would argue that a defendant who gained economic benefit from forum activity should never escape service of process. He might cite the previously mentioned Illinois case, *Nelson v. Miller*,[90] which suggested that personal jurisdiction is not a bargain between the individual and the State. On the other hand, if this position were ultimately adopted by the Ohio courts, reliance on *Ohio* law would be diminished, and a defendant's loss of labor and investment could be aggravated. However, this position could be justified on two grounds. First, the defendant should have also relied on other jurisdictional law which Ohio could have eventually adopted. Second, the present policy of State protection for local injury claims is strong enough to apply to past transactions.

A factor often overlooked by the commentators is the possible disruption of the administration of justice if the long-arm statute were given retroactive application. Suits whose foundations lay in conduct occurring many years ago might be brought, because the statute of limitations had tolled for the plaintiff while the defendant was out of the State. That this is worthy of consideration could be shown by the defendant in analogizing to modern criminal law cases.[91] However, the plaintiff might assert that these cases would be few because the necessary proof and witnesses would be nearly impossible to obtain. On the other hand, if such suit were eventually brought, the defendant would be burdened in his defense because of the passage of time.

(3) Opinion. —Instead of merely holding that a new statute is procedural or substantive, and resolving whether a prior right, liberty, or power to act is vested, the Ohio courts may wish to adopt a due process approach and come to a just conclusion. It should be noted that either *all* defendants or *all* plaintiffs would be injured if a mere arbitrary choice between retroactivity and nonretroactivity were made. One possible solution would be to combine the elements of reliance on Ohio law, reliance on the law of other jurisdictions, loss of labor to the defendant, inequity to the plaintiff, interest of the State in policing local torts, and disruption of the

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[90] 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[91] *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 418 (1966).

administration of justice, and thereby satisfy, most equitably, *some* plaintiffs and *some* defendants.

The court could show that it is somewhat questionable that defendants actually rely on State jurisdictional power when they act. Even if defendants do, since the 1957 Supreme Court decision in *McGee v. International Life Insurance Co.*,[92] it would have been constitutionally permissible to retroactively apply a type of long-arm statute. In that year, *Nelson* was also decided. Further, by 1962, the date of the approval of the *Uniform Interstate and International Procedure Act*, it was quite obvious that Ohio would soon follow the lead of other jurisdictions and enact its own long-arm statute. Thus, by looking to these various decisions and statutes, it was quite possible to foresee that Ohio might some day retroactively apply a long-arm statute. Further, these dates might serve as a possible "cutoff" so that the courts' crowded dockets would not be overburdened. Also, it would seem that State interest in providing local relief to its injured citizens would justify a retroactive application of the long-arm statute, at least back to the year 1962.

III. CONCLUSION

The interpretive problems raised by Ohio's long-arm statute may well be solved by looking to the actual purpose of the act. Former residents should not escape its reach if they are now nonresidents since the act was designed to broaden in personam jurisdiction over nonresidents where the prior law had been inadequate. Since minimum contacts could clearly be shown if applied to a former resident, such an interpretation would not violate any constitutional standard. Further, State interest over former residents is just as strong, if not stronger, than over persons who had never been residents of the forum.

Where jurisdiction is adequately provided for by a presently existing statute in a specific fact situation, there seems to be no justification for applying the long-arm statute to it.

The statute of limitations should not toll where the power of jurisdiction is granted to plaintiffs, and legislation should be considered to include real individual defendants as benefitting from nontolling of the limitations period, especially where they did not

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[92] 335 U.S. 220 (1957).

leave the forum jurisdiction in bad faith, solely to escape service of process.

The long-arm statute should be retroactively applied but not so far back as to deprive defendants of *justifiable* reasonable expectations and to further upset the administration of justice.

GERALD H. RUBIN